ATTORNEY FOR APPELLANT:

RUTH JOHNSON
Marion County Public Defender Agency
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

SCOTT L. BARNHART
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

RANDALL RICHARDS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0610-CR-950
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION COUNTY SUPERIOR COURT
The Honorable Webster Brewer, Judge
Cause No. 49G02-8912-CF-141887

July 13, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Randall Richards appeals from his sentence after he pleaded guilty to Murder, a felony; Attempted Robbery, as a Class A felony; and Criminal Confinement, as a Class B felony. He raises a single issue for our review, which we restate as:

1. Whether the trial court violated his Sixth Amendment right to have aggravating factors determined by a jury beyond a reasonable doubt.

2. Whether the court erred in considering as an aggravator that a lesser sentence would depreciate the seriousness of his offenses.

We affirm.

FACTS AND PROCEDURAL HISTORY

On December 8, 1989, eighteen-year-old Richards entered the Gold and Silver Buyers of America store to sell some gold jewelry. When the store declined Richards' offer, Richards pulled a handgun and declared his intention to rob the store. Richards ordered several employees, including Nancy Wise, to lie on the floor. The store owner and operator, Robert Taylor, produced a firearm and exchanged gun fire with Richards. Taylor shot Richards in the leg, but Richards shot and killed Taylor. Richards then fled the scene without completing the robbery. The State subsequently arrested Richards, who was identified by Wise, and charged him with murder, felony murder, attempted robbery, and four counts of criminal confinement.

On November 26, 1991, Richards pleaded guilty to murder, attempted robbery, and one count of criminal confinement, and he stipulated to the facts described above. Richards' plea called for a sentence between forty and 100 years, and in exchange for the

plea the State dismissed all other remaining charges. The trial court held a sentencing hearing on December 20 and ordered as follows:

> On Count Two, murder, the Court imposes a sentence of sixty years. On Count Three, attempted robbery, the Court imposes a sentence of fifty years. Counts One and Three running concurrently [sic] with each other. On Count Six, confinement the Court commits the defendant to the Department of Corrections [sic] for a period of ten years to run consecutive to the other two counts for a maximum sentence of seventy years. . . .
>
> * * *
>
> Let the record show that the Court has aggravated the sentence and we find in mitigation the Defendant's age and find in mitigation his various physical conditions including dyslexia and his dysfunctional family. But the Court finds the aggravating factors to exceed the mitigating factors. The Court adds to the record that we feel that the Defendant is a confirmed recidivist, that because of his prior incidents of criminality including and not limited to the March conviction of robbery, for which he was committed to the Boys' School and the later conviction of burglary as a juvenile, that the Defendant has demonstrated that he is in fact has [sic] a proclivity to being a misanthrope, and I feel that to give a lesser sentence would depreciate the seriousness of this offense, we feel the Defendant is in need of long-term confinement to insure his total rehabilitation to protect the interest and safety of society. Both you gentlemen have used the word "punishment" but I tell you that our constitution says we do not commit people to institutions for punishment. So the Court considers this to be in the nature of protecting society and for the treatment of the Defendant.

Transcript at 122-24. On October 3, 2006, Richards filed a pro se petition to file a belated notice of appeal, which the trial court granted.[1] This appeal ensued.

[1] In his petition, Richards asserted that he was never informed of a right to appeal by the State or the trial court and that, upon learning of that right, he immediately filed his petition. The trial court granted his petition without a hearing or specific findings. We will affirm a trial court's ruling on a petition to file a belated appeal "unless it [is] based on an error of law or a clearly erroneous factual determination." Moshenek v. State, No. 42S04-0706-PC-244, ___ N.E.2d ___, slip op. at 1 (Ind. June 20, 2007). Here, Richards' assertions, which are uncontested, support each of the two requirements of Indiana Post-Conviction Rule 2. See Witt v. State, No. 45S00-0608-CR-283, ___ N.E.2d ___ (Ind. June 12, 2007). Thus, we review the merits of his appeal.

DISCUSSION AND DECISION

Issue One: Blakely

Richards first asserts that the trial court violated his Sixth Amendment right to have aggravating factors determined by a jury, contrary to Blakely v. Washington, 542 U.S. 296 (2004). However, our Supreme Court has recently held that "belated appeals of sentences entered before Blakely[] are not subject to the holding of that case." Gutermuth v. State, No. 10S01-0608-CR-306, ___ N.E.2d ___, slip op. at 1 (Ind. June 20, 2007). That is, "Blakely is not retroactive for Post-Conviction Rule 2 belated appeals." Id. at 7. Accordingly, Richards' claims under Blakely must fail.

Issue Two: Improper Aggravator

Richards also argues that the "court incorrectly identified as an aggravating factor 'that to give a lesser sentence would depreciate the seriousness of the offense.'" Appellant's Brief at 5 (quoting transcript at 124). Our Supreme Court has long held that that aggravator "may only be used when a trial court is considering imposition of a sentence which was shorter than the presumptive sentence." Taylor v. State, 840 N.E.2d 324, 340 (Ind. 2006) (citing Evans v. State, 497 N.E.2d 919, 923 (Ind. 1986)). Here, there is no evidence that the trial court considered a sentence shorter than the presumptive for any of the convictions. Thus, the court erroneously used this factor to support an enhanced sentence. See id.

Nonetheless, a single proper aggravating factor can support a sentence enhancement. Burks v. State, 838 N.E.2d 510, 525 (Ind. Ct. App. 2005), trans. denied. Here, in addition to the improper aggravator, the trial court gave significant weight to

Richards' criminal history. Richards' criminal history demonstrates that, by the time he was eighteen years old, he had adjudications against him for three other acts of robbery, one act of burglary, and one act of theft. Each of those acts would have been a felony if committed by an adult. Richards also had one count of theft and one count of automobile theft dismissed before he was arrested for the instant offenses. Thus, the trial court placed significant emphasis on Richards' criminal history, noting that Richards was a "confirmed recidivist," that he "has a proclivity to being a misanthrope," and that he is in "need of long-term confinement to insure his total rehabilitation to protect the interest and safety of society." Transcript at 123-24. On appeal, Richards challenges neither the trial court's identification of his criminal history as an aggravator nor the weight the court gave that aggravator.

When a court has relied on valid and invalid aggravators the standard of review is whether we can say with confidence that, after balancing the valid aggravators and mitigators, the sentence enhancement should be affirmed. See, e.g., Trusley v. State, 829 N.E.2d 923, 927 (Ind. 2005). When we exclude from consideration the invalid aggravator of the depreciation of the seriousness of the offenses, and we balance the valid aggravator of Richards' significant criminal history with the mitigators identified by the trial court, we can say with confidence that the trial court would have imposed the same sentence even without the improper aggravator.

Affirmed.

RILEY, J., and BARNES, J., concur.